STATE OF WISCONSIN CIRCUIT COURT COUNTY OF DANE
BRANCH 2

DANE COUNTY et al.,

Plaintiffs,

Vs.

Case No. 11CV1175

STATE OF WISCONSIN, et al.,

Defendants.

DECISION AND ORDER ON MOTION TO DISMISS

This case is before the court on the State Defendants' joint motion to dismiss Dane County's complaint for declaratory and injunctive relief. Plaintiffs Dane County, County Executive Kathleen Falk and County Board Chair Scott McDonell (hereinafter "Dane County") ask the court to issue a declaratory judgment that 2011 Wisconsin Act 10 ("Budget Repair Bill") violates Art. VIII, § 8, Art. IV, §§ 10 and 11, Art. V, § 4, and Art. IV, § 26 of the Wisconsin Constitution. Dane County further asks the court to enjoin implementation of 2011 Wisconsin Act 10.

Defendants State of Wisconsin, Secretary of State Douglas LaFollette, Department of Administration Secretary Michael Huebsch and Department of Health Services Secretary Dennis G. Smith ("State Defendants") move to dismiss the complaint on multiple grounds. For the reasons set forth in this Decision, the

court grants defendants' motion to dismiss with respect to Dane County's claims of constitutional violations. The court holds in abeyance the motion to dismiss the individual claims of plaintiffs Falk and McDonell until a hearing on the Motion for Leave to File Second Amended Complaint.

PROCEDURAL BACKGROUND

Dane County's March 11, 2011 original complaint challenges the process by which the Wisconsin Legislature enacted 2011 Wisconsin Act 10. Dane County amended its complaint on March 18, 2011 to substitute defendants Huebsch and Smith for Senator Scott Fitzgerald, Senator Michael Ellis, Representative Jeff Fitzgerald and Representative Scott Suder. The amended complaint further alleges that the Governor signed the "Conference Substitute Bill" on March 11, 2011. Just as the original complaint, the amended complaint requests both a declaratory judgment that the Budget Repair Bill violates the Constitution and an injunction restraining its implementation.

In response, the State Defendants moved to dismiss the complaint pursuant to Wis. Stats. § 802.06(2). They assert that: (1) the court lacks jurisdiction because the action was not commenced by filing of a summons and complaint; (2) the court lacks jurisdiction because the Budget Repair Bill has not yet become law; (3) the open meetings law claims are not properly before the court; (4) Plaintiff Dane County lacks capacity to sue the state; (5) individual Plaintiffs Falk and McDonnell failed to allege sufficient facts to demonstrate that the Act will affect them personally; (6) sovereign immunity deprives the court of

personal jurisdiction over the State Defendants; and (7) the complaint fails to state a claim upon which relief can be granted with respect to the constitutionality of the Budget Repair Bill.

On March 30, 2011 Dane County filed a Motion for Leave to Amend its amended complaint and a proposed Second Amended Complaint.[1] The proposed Second Amended Complaint attempts to address potential deficiencies raised in the State Defendants' Motion to Dismiss. The Second Amended Complaint adds allegations that plaintiffs Falk and McDonell bring suit in both their official and individual capacities, that their individual compensation will be diminished by the provisions of the Budget Repair Bill, and that performance of their official duties will be impaired (¶¶ 1-2, 22, 41-42). The proposed Second Amended Complaint also cites specific provisions of the Conference Substitute Bill plaintiffs allege to be substantive fiscal items (¶ 20 a.-h.).

DECISION

I. STANDARD OF REVIEW ON MOTION TO DISMISS

At this early stage of the proceedings, a motion to dismiss does not allow the court to determine whether the facts alleged are true or false, but simply whether the complaint is legally sufficient to go forward. Because of this, a motion to dismiss takes the facts alleged as true, but only for purposes of testing the complaint's legal sufficiency. A complaint should not be dismissed as legally insufficient unless it appears certain that a plaintiff cannot recover under the

[1] Wis. Stats. §802.09(1) allows a party to amend its pleadings once as a matter of right. "Otherwise, a party may amend the pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given at any stage of the action when justice so requires."

facts stated. *Beloit Liquidating Trust v. Grade,* 2004 WI 39, ¶ 17, 270 Wis. 2d 356.

The original, first and second amended complaints, although naming different parties and offering additional facts, allege the same substantive claims against the defendants:

(1) That 2011 Wisconsin Act 10 was enacted in violation of Wis. Const. Art. VIII, § 8 because the Wisconsin Senate did not have a three-fifths quorum to vote on the Conference Substitute Bill on March 9, 2011.

(2) That 2011 Wisconsin Act 10 was enacted in violation of Wis. Const. Art. IV, § 11 and Art. V, § 4 because portions of it are not germane to the purpose of the special legislative session.

(3) That the Joint Committee of Conference meeting held March 9, 2011 leading to the enactment of 2011 Wisconsin Act 10 violated Wis. Const. Art. IV, § 10 and Wisconsin's Open Meetings Law, §§ 19.81-19.97, Wis. Stats.

(4) That 2011 Wisconsin Act 10 purports to diminish the compensation of public officers during their term of office in violation of Wis. Const. Art. IV, § 26(2).

Dane County's response to the motion to dismiss affirmatively states that "Plaintiffs do not seek enforcement of the [open meetings] law under § 19.97 of the Wisconsin Statutes" (brief at p. 7). Dane County repeated that

statement at oral argument April 13, 2011. In so stating, Dane County acknowledges that only the District Attorney or the Attorney General may enforce under that section. Instead, Dane County suggests that "constitutional violations" are independently enforceable.

With the elimination of the statutory open meetings claim in the complaint[2], all of Dane County's remaining claims assert violations of the Wisconsin Constitution. Of the seven grounds upon which defendants seek dismissal, one is dispositive as to Dane County and its officers: the legal authority or "standing" of a governmental unit to challenge the constitutionality of state statutes.

II. DANE COUNTY LACKS STANDING TO ASSERT CONSTITUTIONAL CLAIMS AGAINST THE STATE DEFENDANTS.

The state defendants ask the court to dismiss the County's claims because, as an arm of government, the County lacks "capacity" to sue the State (brief at pp. 10-12).[3] In essence, defendants invoke the venerable rule that "a county as a quasi-municipal corporation and as an arm of the state has no right to question the constitutionality of the acts of its superior and creator or of another arm or governmental agency of the state." *Columbia County v. Wisconsin Retirement Fund,* 17 Wis. 2d 310, 317, 116 N.W. 2d 142 (1962). *See also: Kenosha v. State,* 35 Wis. 2d 317, 151 N.W. 2d 36 (1967); *Madison*

[2] The court refers to "the complaint" without reference to original, first or second amended complaint when it is not necessary to differentiate between them because of common allegations.

[3] Although the concept of standing is sometimes referred to as "capacity" to bring suit, Wisconsin cases commonly use the term "standing" in this context. See: *City of Appleton v. Town of Menasha*, 142 Wis. 2d. 870, 873, fn. 2, 419 N.W. 2d 249 (1988).

Metropolitan Sewerage Dist. v. Committee on Water Pollution, 260 Wis. 229, 50 N.W. 2d 424 (1951); *City of Eau Claire v. Department of Natural Resources,* 60 Wis. 2d 751, 210 N.W. 2d 771 (1973).

Wisconsin courts apply this rule through the concept of "standing" or legal authority to bring suit. In *State v. City of Oak Creek,* 2000 WI 9, ¶ 17, 232 Wis. 2d 612, quoting *Norquist v. Zueske,* 211 Wis. 2d 241, 564 N.W. 2d 748 (1997), the Wisconsin Supreme Court described standing for purposes of attacking the constitutionality of a state statute as follows: "A party has standing to challenge a statute's constitutionality if the party has a sufficient interest in the outcome of a justiciable controversy 'to obtain judicial resolution of that controversy'." The Court continued:

> Standing is determined by a two-step analysis. A court must determine "(1) whether the plaintiff has suffered a threatened or actual injury, and (2) whether the interest asserted is recognized by law."

City of Oak Creek, 2000 WI 9, ¶17 (citations omitted).

For purposes of the state defendants' motion to dismiss, the court accepts as true the allegations related to the first part of the standing test, the threat of injury to plaintiffs. The court turns to the second part of the standing analysis, whether the County's interest in challenging the constitutionality of state statutes is recognized by law.

In *City of Oak Creek,* the Wisconsin Supreme Court concluded that the Attorney General's interest in challenging the constitutionality of a statute was

not an interest recognized by law and the Attorney General thus lacked standing to assert his constitutional challenge.[4] The Court concluded, 2009 WI 9 at ¶ 55:

> We conclude that the attorney general lacks standing to bring this action because the legislature has not granted him the statutory authority to attack the constitutionality of Wis. Stat. § 30.056. Our conclusion rests on a strong foundation of precedent and constitutional history.

If the Attorney General lacks authority to challenge the constitutionality of a statute, a county or other arm of government cannot reasonably claim that it has superior or independent authority to do so.

Dane County does not assert that there is any other law giving it standing or recognizing its interest in challenging the constitutionality of Wis. Act 10. The court is bound by the Wisconsin Supreme Court's unequivocal holding in *State v. City of Oak Creek*, and must apply it to bar Dane County's constitutional claims.

As Dane County points out, the Supreme Court has created exceptions to the general rule that public agencies and officers cannot question the constitutionality of a statute. Here, Dane County relies on the "great public concern" exception established in *Fulton Foundation v. Dept. of Taxation,* 13 Wis. 2d 1, 13, 108 N.W. 2d 312 (1961). *Fulton* described an "issue of great public concern" as a "matter of great public interest." *Id.* Probably because the definition is woefully loose and subjective, the "great public concern" exception has been applied sparingly. *City of Madison v. Ayers,* 85 Wis. 2d 540, 546, 271 N.W. 2d 101 (1978).

[4] In *City of Oak Creek* the statute at issue, §30.056, created a statutory exemption from Ch. 30 water regulatory permits.

In *City of Oak Creek,* the Supreme Court rejected the use of the "great public concern" exception when the suit is between an arm of government and the state itself. The Court stated in no uncertain terms:

> Moreover, the great public concern exception does not apply to "suits between two creatures of the state" [citations omitted]. In *Columbia County v. Board of Trustees of the Wisconsin Retirement Fund,* 17 Wis. 2d 310, 318, 116 N.W. 2d 142 (1962), we declined to extend the exception to "suits between two agencies of the state government or between an arm of the government and the state itself" [citations omitted]. Because the attorney general's office and Oak Creek are both "creatures of the state," the great public concern exception does not apply.

2000 WI 9, ¶ 41.

Accordingly, the "great public concern" exception does not apply here. Dane County lacks standing to assert its constitutional claims against the state defendants. Dane County's claims must be dismissed, leaving only the claims asserted by plaintiffs Falk and McDonnell.

III. STANDING OF PLAINTIFFS FALK AND McDONELL TO ASSERT CONSTITUTIONAL CLAIMS

Plaintiffs' proposed second amended complaint alleges that County Executive Falk and County Board Chair McDonell sue in both their official and individual capacities and as Wisconsin taxpayers (¶¶ 1,2). Paragraphs 41 and 42 allege as follows:

> 41. Plaintiffs Falk and McDonell in their individual capacities stand to suffer an immediate loss of their post-tax salaries and Plaintiff McDonell will immediately suffer loss of an additional portion of his salary as a State employee, because he will be required to contribute a portion of the cost of his health insurance premium, and will lose bargaining rights if 2011 Wisconsin Act 10 is permitted to become law.

> 42. Plaintiffs Falk and McDonell in their official capacities will suffer the irreparable loss of management authority over the county workforce resulting in the predictable loss of a stable workforce and labor peace, the loss of flexibility of available means to meet fiscal challenges at the county level and damage to the ability to attract well-qualified candidates to fill open county positions without alienating the existing workforce.

In addition, ¶ 22 of the proposed Second Amended Complaint adds a constitutional claim unique to plaintiffs Falk and McDonell, that the "the bill would have the effect of diminishing the compensation of Plaintiffs Falk and McDonell during their terms in office contrary to Article IV, section 26(2) of the Wisconsin Constitution."

The court first addresses the claims brought in Falk's and McDonell's official capacities. The issue is whether these plaintiffs have standing as Dane County officials, independent of Dane County itself, to challenge the constitutionality of 2011 Wis. Act 10. The answer is no.[5]

In *Columbia County v. Wisconsin Retirement Fund,* 17 Wis. 2d 310, 318-319, the Court distinguished between taxpayer standing to challenge the constitutionality of statutes and the legal standing of public agencies or public officers to do so:

> The injury to the individual taxpayer in this suit is distinct from the injury complained of or alleged by the county. If the taxpayer was attempting to protect the same interests which the county was attempting to protect if it could sue, the taxpayer's suit would be derivative. But here, the taxpayer alleged in his

[5] At the April 13, 2011 oral argument on the motion to dismiss, Special Counsel Charles Hoornstra acknowledged that the "official capacity" claims of Falk and McDonell "stand or fall with the determination of great public concern"—in other words, if Dane County lacks standing to assert constitutional violations, so do its officials.

> complaint a direct pecuniary loss to him as a taxpayer of the state of Wisconsin and to other taxpayers similarly situated.

Under this analysis, standing depends on whether the "official capacity" claims are derivative—by attempting to protect the same interests as the County—of Dane County's constitutional claims.

The Supreme Court applied the derivative vs. nonderivative analysis in the context of a third-party taxpayer action in *City of Appleton v. Town of Menasha,* 142 Wis. 2d 870, 875-878. In that case, the Court explained that in a derivative action, the plaintiff's rights in the suit are coextensive with those of the municipality. Thus, if the plaintiff's rights are no greater than that of the municipality, the plaintiff cannot challenge the constitutionality of the statute because the municipality is forbidden to do so. By contrast, to be considered a "nonderivative" action, and thus able to raise constitutional arguments, "the taxpayer must allege and prove a direct and personal pecuniary loss, a damage to himself different in character from the damage sustained by the general public." *Id.* at 877.

There is no lawful basis upon which the court could find that the plaintiffs' official capacity claims stand independent of Dane County's constitutional claims. Accordingly, the Falk and McDonell claims brought in their official capacities must be dismissed.

IV. CLAIMS BROUGHT IN PLAINTIFF FALK AND McDONELL PERSONAL AND TAXPAYER CAPACITIES

With the dismissal of Dane County's claims and the official capacity claims of plaintiffs Falk and McDonell, the only remaining claims are those asserted in the proposed second amended complaint by Falk and McDonell as individuals and taxpayers, which has not yet been accepted for filing. The court will set a hearing on the Motion for Leave to File Second Amended Complaint.

CONCLUSION

As explained in this Decision, because Dane County and its officers lack standing to bring their constitutional challenges, the court grants defendants' motions to dismiss those claims. The court need not and does not address other grounds for defendants' motion.

In light of this decision, it would be reasonable to question why the Dane County District Attorney has authority to enforce alleged open meetings law violations arising out of the enactment of 2011 Wisconsin Act 10, but Dane County lacks authority to challenge the Act on constitutional grounds.[6] The answers are straightforward: the District Attorney has explicit statutory authority to enforce the open meetings law; Dane County does not. Moreover, § 19.97(2) and (3), Wis. Stats., grant the circuit court express authority to void action taken in violation of the open meetings law and to issue injunctive relief. That statute, however, does not authorize the court to declare statutes unconstitutional. Dane

[6] See: State ex rel. *Ozanne v. Fitzgerald*, et al., Dane County Circuit Court Case No. 11CV1244, now awaiting review by the Wisconsin Supreme Court. The dismissal of Dane County's Claims in this Decision has no effect on *Ozanne v. Fitzgerald.*

County's claims are not statutory; they are constitutional. Under longstanding Wisconsin law, an agency or arm of government lacks authority to challenge the constitutionality of state statutes.

ORDER

For the reasons stated in the foregoing Decision, the court GRANTS defendants' motion to dismiss the complaint of Dane County, and County Executive Falk and County Board Chair McDonell as Dane County officials, for lack of standing to assert constitutional claims. The court holds in abeyance the individual and taxpayer claims asserted by plaintiffs Falk and McDonell.

This is a final order for purposes of appeal as to Dane County and its officials.

Dated this 14th day of April, 2011.

BY THE COURT

/s/
Maryann Sumi, Judge
Circuit Court Branch 2

Cc: Corporation Counsel Marcia MacKenzie
AAG Steven Kilpatrick
Atty. Joseph Olson